IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 385

JOHN J. McGIRL and GEORGE FURST, Trustees of SOLAR MANUFACTURING CORPORATION,

Petitioners,

vs.

BEN MINTZ and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT, BEN MINTZ.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Trustees-Petitioners, after a review of the brief of the respondent, Ben Mintz, in opposition to the Trustees' Petition for Writ of Certiorari, have deemed it necessary to file a short reply brief in order to correct the patent misconception of the fundamental questions involved which are (1) did the District Court commit a gross abuse of discretion amounting to an error of law in interpreting Section 160 of the Bankruptcy Act under which it appointed the Trustees and if it did not (2) did the United States Court of Appeals for the Third Circuit have the power to direct the District Court to remove one of the Trustees appointed by it.

Under Point I of the respondent's brief, the respondent concludes that "the Court of Appeals was fully justified by the facts before it" in arriving at the decision it did. It must, however, be remembered that the District Court had before it not only the facts that the Circuit Court had before it, but also had before it all of the facts concerned with the administration of the debtor's estate by the Trustees since the filing of the petition of reorganization and the appointment of the Trustees on December 14, 1948. As pointed out in the petitioners' main brief, the District Judge has been most intimately associated with the affairs of the debtor's estate since its inception and, therefore, found, as set forth in his opinion (R. 25):

> "I was not impressed with the argument that there should be a change in the trusteeship at this critical point. However, any subsequent fees or allowances made to the trustees must of necessity be small. They are both still needed to aid in the preparation and institution of suits which are to be commenced in the very near future."

From his intimate acquaintance with the two suits presently pending, involving in excess of one million dollars (R. 44), we submit that the District Judge was entirely warranted in his finding that one of the Trustees should not be discharged at this "critical time" and that they were both needed to aid in such impending litigation.

Under Point II the respondent states that it is difficult to accept a contention "which so exalts the power of the District Court on the removal or retention of trustees as to make it virtually free of appellate scrutiny" (Respondent's Brief, p. 9).

We desire to point out that the petitioners' in their main brief under Point II have "exalted" no power of the

District Court but have cited cases supporting the simple and fundamental proposition of law that the Appellate Court, absent a clear showing that the District Court had committed a gross abuse of discretion, amounting to an error of law in interpreting the statute under which it was acting, should not have reversed the District Court in its decision, refusing to remove one of the Trustees appointed by it.

The respondent under Point II of his brief reaches the unwarranted conclusion that the Appellate Court had the supervisory power to revise the District Court's decision in a matter involving the fundamental exercise of discretion by the District Court. This conclusion is certainly erroneous.

The power given Circuit Courts of Appeals to superintend and revise, in matters of law, the proceedings of inferior Courts of Bankruptcy, we submit, does not authorize the revising Court to exercise the discretion vested in the Courts of Bankruptcy, nor in ordinary cases to revise the exercise of such discretion.

In the case of *In Re Judkins Co.*, 205 F. 892 (CA 1, 1913) the District Court of the United States for the District of Massachusetts, on application to it, revoked the reference and made a new reference to a new referee. The bankrupt company filed a petition to the Circuit Court of Appeals under Section 24(b) of the Bankruptcy Act, which gave the Circuit Courts of Appeals jurisdiction on such petitions to superintend and revise, in matters of law, the proceedings of the Courts of Bankruptcy, the purpose being to reinstate the original referee.

In a *Per Curiam* opinion at page 894, the Court said:

> "There is so much discretion given the courts of bankruptcy in the matter of selecting referees that

> we question whether we have the power to 'superintend and revise' under circumstances like the present within the meaning of the statute; it being clear that we cannot exercise the discretion vested in the courts of bankruptcy, nor revise the exercise of their discretion in ordinary cases of this kind."

We submit that the same discretion given Courts of Bankruptcy in the matter of selecting referees is involved in the appointment and removal of Trustees by the District Court under Section 160 of the Bankruptcy Act involved in the case at bar.

In the case of *In Re Diamond Fuel Co.* (6 F. 2d 773 CA 2, 1925) Judge Rogers had this to say at page 776:

> "This court, in Re Grant, 238 F. 132, 151 C. C. A. 208, again had before it an appeal from an allowance of fees to the attorneys for the bankrupt. We declined in that case to interfere and said: 'In a proceeding in bankruptcy there are many matters which are not governed by a fixed rule, but are confided to the sound judicial discretion of the judge. His decision in such cases may be brought before the Circuit Court of Appeals for review. But the appellate courts have established the rule that in such cases they will not reverse, unless the decision below was unmistakably wrong, or unless a plain abuse of discretion is shown. In re S. B. Judkins Co., 205 Fed. 892, 124 C. C. A. 205; Black on Bankruptcy, §48.' We adhere to what the court said in that case. We have the right to review such cases for the purpose of ascertaining whether the court below has proceeded, in our opinion, contrary to correct principles of law, or has in some way abused the sound discretion with which it is invested by the Bankruptcy Act."

See also the cases cited under Point II of petitioner's main brief, pages 18 to 22, inclusive.

We submit, therefore, that the United States Court of Appeals for the Third Circuit not having found that the District Court had committed a gross abuse of discretion as defined by the Courts, to wit, an error of law in interpreting Section 160 of the Bankruptcy Act, was not authorized to exercise any supervisory power vested in it nor to exercise the discretion vested in the District Court nor to revise the exercise of such discretion.

Respectfully submitted,

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